

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WANDA NESMITH, o/b/o A.S., a	)	
minor child,	)	No. CV-07-217-CI
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT
v.	)	AND REMANDING FOR FURTHER
	)	PROCEEDINGS
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on January 14, 2008. (Ct. Rec. 13, 15.) Plaintiff filed a reply brief on January 14, 2008. (Ct. Rec. 17.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13) and remands the matter to the Commissioner for additional proceedings. Defendant's Motion for Summary Judgment (Ct. Rec. 15) is **DENIED**.

**JURISDICTION**

The current application for Social Security Income ("SSI")

1 benefits on behalf of a minor child ("Plaintiff'), was protectively  
2 filed on January 24, 2003, alleging disability since November 17,  
3 1992, due to cerebral palsy with static encephalopathy and memory  
4 deficits. (Tr. 364-367.) The application was denied initially and  
5 on reconsideration. (Tr. 343-347, 350-352.) On April 25, 2005, an  
6 administrative hearing was held before Administrative Law Judge  
7 ("ALJ") John R. Crickman, at which time testimony was taken from  
8 Plaintiff, represented by counsel, her mother, Wanda Nesmith, and  
9 medical expert Jay Toews, Ed.D. (Tr. 482-523.) On July 28, 2005,  
10 the ALJ issued a decision finding that Plaintiff was not disabled.  
11 (Tr. 19-27.) The Appeals Council denied a request for review on  
12 June 22, 2007. (Tr. 8-10.) Therefore, the ALJ's decision became  
13 the final decision of the Commissioner, which is appealable to the  
14 district court pursuant to 42 U.S.C. § 405(g). On July 13, 2007,  
15 Plaintiff filed this action for judicial review pursuant to 42  
16 U.S.C. § 405(g). (Ct. Rec. 1, 4).

#### 17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing  
19 transcript, the ALJ's decision, the briefs of both Plaintiff and the  
20 Commissioner and will only be summarized here. When Plaintiff was  
21 nineteen months old, a pediatric neurologist diagnosed a mild  
22 encephalopathic process that was revealed by abnormal muscle tone.  
23 Eventually Plaintiff was diagnosed with static encephalopathy/  
24 cerebral palsy and borderline intellectual functioning. Her onset  
25 date is November 17, 1992. (Tr. 364, 445-448.)

26 Plaintiff was 13 years old and had just finished the seventh  
27 grade at the time of the hearing. (Tr. 20, 498.) She testified  
28 that she does not make her bed, "kind of" helps her mother around

1 the house, looks at her fingers when she types, has friends who are  
2 girls, and helps with grocery shopping. (Tr. 501-504.) She goes to  
3 a homework center at school twice a week for help. (Tr. 506-507.)

4 Ms. Nesmith, Plaintiff's mother, testified that Plaintiff was  
5 developmentally delayed and eventually diagnosed with cerebral palsy  
6 at age two. Plaintiff needs to be told "two or three times what you  
7 want her to do." (Tr. 505-506.) Plaintiff takes care of her dog;  
8 loses concentration quickly; is able to sit through half of a movie,  
9 and has been in special education classes since third or fourth  
10 grade. (Tr. 506, 509.) Plaintiff had a problem with bed-wetting  
11 since she was four years old, but it is controlled with medication.  
12 (Tr. 510.) Ms. Nesmith testified that Plaintiff requires close  
13 supervision. When she asked her daughter to pick up a prescription,  
14 Plaintiff forgot what she was sent to do and went to a friend's  
15 house without notifying Ms. Nesmith. (Tr. 514-515.)

#### 16 SEQUENTIAL EVALUATION PROCESS

17 To qualify for disability benefits, a child under the age of  
18 eighteen must have "a medically determinable physical or mental  
19 impairment, which results in marked and severe functional  
20 limitations, and which can be expected to result in death or which  
21 has lasted or can be expected to last for a continuous period of not  
22 less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(I). Pursuant to  
23 this statutory dictate, the Social Security Administration has  
24 enacted a three-step sequential analysis to determine whether a  
25 child was eligible for SSI benefits on the basis of a disability.  
26 20 C.F.R. § 416.924(a). First, the ALJ considers whether the child  
27 is engaged in "substantial gainful activity." *Id.* at § 416.924(b).  
28 Second, the ALJ considers whether the child has a "medically

determinable impairment that is severe," which is defined as an impairment that causes "more than minimal functional limitations." *Id.* at § 416.924(c). Finally, if the ALJ finds a severe impairment, he or she must then consider whether the impairment "medically equals" or "functionally equals" a disability listed in the regulatory "Listing of Impairments." *Id.* at § 416.924(c)-(d); *Id.* at Pt. 404, Subpt. P.

Pursuant to the final rules effective January 2, 2001,<sup>1</sup> an impairment will be found to be functionally equivalent to a listed impairment if it results in extreme limitations in one area of functioning or marked limitations in two areas. 20 C.F.R. § 416.926a (a). An impairment is a "marked limitation" if it "seriously interferes with [a person's] ability to independently initiate, sustain, or complete activities." 20 C.F.R. § 416.926a(e)(20(I). By contrast, an "extreme limitation" is defined as a limitation that "interferes very seriously with [a person's] ability to independently initiate, sustain, or complete activities." 20 C.F.R. § 416.926a(e)(3)(I).

The child's functioning in six domains is assessed, and

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<sup>1</sup> On September 11, 2000, the SSA published the Final Rules implementing the Welfare Reform Act, which became effective January 2, 2001 (the "Final Rules"). Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747 (Sept. 11, 2000) (codified at 20 C.F.R. pts. 404, 416). The Final Rules apply because Plaintiff's current application was protectively filed January 24, 2003, well after the January 2, 2001, effective date.

1 includes determining the child's ability: (1) to acquire and use  
2 information; (2) to attend and complete tasks; (3) to interact and  
3 relate with others; (4) to move about and manipulate objects; (5) to  
4 care for oneself; and (6) health and physical well-being. 20 C.F.R.  
5 § 416.926a(a)-(b)(2001). To demonstrate functional equivalence  
6 under the Final Rules, the child must exhibit a marked limitation in  
7 two of the domains, or an extreme limitation in one domain. 20  
8 C.F.R. § 416.926a(e)(2)(I).

#### 9 STANDARD OF REVIEW

10 Congress has provided a limited scope of judicial review of a  
11 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
12 the Commissioner's decision, made through an ALJ, when the  
13 determination is not based on legal error and is supported by  
14 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
15 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
16 "The [Commissioner's] determination that a plaintiff is not disabled  
17 will be upheld if the findings of fact are supported by substantial  
18 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)  
19 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a  
20 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup>  
21 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
22 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of*  
23 *Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988).  
24 Substantial evidence "means such evidence as a reasonable mind might  
25 accept as adequate to support a conclusion." *Richardson v. Perales*,  
26 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences  
27 and conclusions as the [Commissioner] may reasonably draw from the  
28 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,

1 293 (9<sup>th</sup> Cir. 1965). On review, the court considers the record as  
2 a whole, not just the evidence supporting the decision of the  
3 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)  
4 (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

5 It is the role of the trier of fact, not this court, to resolve  
6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
7 supports more than one rational interpretation, the court may not  
8 substitute its judgment for that of the Commissioner. *Tackett*, 180  
9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
10 Nevertheless, a decision supported by substantial evidence will  
11 still be set aside if the proper legal standards were not applied in  
12 weighing the evidence and making the decision. *Brawner v. Secretary*  
13 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987).  
14 Thus, if there is substantial evidence to support the administrative  
15 findings, or if there is conflicting evidence that will support a  
16 finding of either disability or nondisability, the finding of the  
17 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
18 1230 (9<sup>th</sup> Cir. 1987).

#### 19 **ALJ'S FINDINGS**

20 Plaintiff previously was awarded benefits from June 15, 1994,  
21 through March 10, 2000, when she was found to have medically  
22 improved. (Tr. 19.) A prior ALJ denied Plaintiff's appeal on June  
23 4, 2002, and the Appeals Council denied review. Because Plaintiff  
24 did not appeal the determination, the current ALJ found no reason to  
25 reopen Plaintiff's prior application. (Tr. 19.) At step one, the  
26 ALJ found that Plaintiff has not engaged in substantial gainful  
27 activity. (Tr. 20.) At step two, he determined that Plaintiff  
28 suffers from a history of cerebral palsy, low IQ, and enuresis.

(Tr. 23.) The ALJ determined the evidence of record demonstrated that Plaintiff's impairments, although severe, do not meet, medically equal, or functionally equal the criteria of any of the listings impairments. (Tr. 23-24.) With regard to functional equivalence, the ALJ concluded that Plaintiff does not have an "extreme" limitation in any domain of functioning or a "marked" limitation in two domains. (Tr. 25.) Accordingly, the ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act. (Tr. 26.)

#### ISSUES

Plaintiff contends that the Commissioner erred as a matter of law. Specifically, she argues that the ALJ erred by rejecting the opinion of her treating nurse practitioner and of an examining psychologist, and by relying on the opinion of the testifying medical expert. (Ct. Rec. 14 at 7-12.) The Commissioner responds that the ALJ properly weighed the medical testimony.

The court must uphold the Commissioner's determination that Plaintiff is not disabled if the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision.

#### DISCUSSION

##### A. Opinion of Treating Nurse Practitioner

Plaintiff alleges that the ALJ failed to properly credit the opinion of her treating nurse practitioner, Katie Jones, A.R.N.P. The Commissioner responds that the ALJ gave specific and legitimate reasons for rejecting Ms. Jones's opinion. The ALJ did not reject Ms. Jones's opinion based on a nurse practitioner's general status

1 as a non-authorized medical source.<sup>2</sup>

2 In social security proceedings, the claimant must prove the  
3 existence of a physical or mental impairment by providing medical  
4 evidence consisting of signs, symptoms, and laboratory findings; the  
5 claimant's own statement of symptoms alone will not suffice. 20  
6 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
7 the basis of a medically determinable impairment which can be shown  
8 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical  
9 evidence of an underlying impairment has been shown, medical  
10 findings are not required to support the alleged severity of  
11 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991).

12 A treating or examining physician's opinion is given more  
13 weight than that of a non-examining physician. *Benecke v. Barnhart*,  
14 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
15 physician's opinions are not contradicted, they can be rejected only  
16 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,  
17 830 (9<sup>th</sup> Cir. 1996). If contradicted, the ALJ may reject an opinion  
18 if he states specific, legitimate reasons that are supported by  
19 substantial evidence. See *Flaten v. Secretary of Health and Human*  
20 *Services*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995). In addition to medical

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21  
22 <sup>2</sup> SSR 06-03p provides:

23 The term "medical sources" refers to both "acceptable  
24 medical sources" and other health care providers who are  
25 not "acceptable medical sources." See 20 CFR 404.1502 and  
26 416.902. . . . In addition to evidence from "acceptable  
27 medical sources," we may use evidence from "other  
28 sources," as defined in 20 CFR 404.1513(d) and 416.913(d),  
to show the severity of the individual's impairment(s) and  
how it affects the individual's ability to function.  
These sources include . . . nurse practitioners . . . .  
Information from these "other sources" cannot establish  
the existence of a medically determinable impairment.



1 reports in the record, the analysis and opinion of a non-examining  
2 medical expert selected by an ALJ may be helpful in his  
3 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir.  
4 1995)(citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)).  
5 Testimony of a medical expert may serve as substantial evidence when  
6 supported by other evidence in the record. *Id.*

7 Nurse practitioner Jones began seeing Plaintiff when she was  
8 nine days old, in 1991, through at least October 5, 2004. (Tr. 286;  
9 461-466.) Chart notes indicate "motor/language delays" in October  
10 of 1994 and 1995 (Tr. 295-296). In August of 2001 (when Plaintiff  
11 was nine years old), Ms. Jones noted that Plaintiff's mother  
12 indicated an Individual Educational Plan (IEP) was planned for the  
13 fall because Ms. Nesmith was advised Plaintiff required special  
14 education classes in reading and math. Plaintiff was attending  
15 summer school. (Tr. 300.)

16 The ALJ noted that in March of 2003, Ms. Jones opined that  
17 Plaintiff was "two grade levels below her current grade level in  
18 reading, writing, language, and math. Nurse Jones wrote she  
19 [Plaintiff] had a very marked limitation in short-term memory  
20 capabilities and qualified for special education services. Office  
21 notes indicate problems with bed-wetting." (Tr. 21.)

22 The ALJ rejected Ms. Jones's opinion:

23 "Katie Jones, nurse practitioner, opined the claimant had a  
24 very marked limitation in short-term memory capabilities, however,  
25 this statement is not supported by any objective evidence, and is in  
26 conflict with the evidence as a whole." (Tr. 25.)

27 The Commissioner responds that the opinion of the testifying  
28 psychological expert, Jay Toews, Ed.D., and of examining

1 psychologist Grant Gilbert, Ph.D., support the ALJ's assessment.  
2 (Ct. Rec. 16 at 7-8.)

3 Dr. Gilbert performed a consultative examination of Plaintiff  
4 in May of 2003 (Tr. 445-448), about two years before the hearing.  
5 Dr. Gilbert's record review included a letter dated March 4, 2003,  
6 and progress notes dated June 30, 1999, through August 27, 2002,  
7 from Ms. Jones. Dr. Gilbert noted that Plaintiff was diagnosed with  
8 cerebral palsy at age two. (Tr. 445.) Upon testing, Plaintiff  
9 recalled three of three items immediately, as well as after 15  
10 minutes. (Tr. 446.) Dr. Gilbert diagnosed borderline intellectual  
11 functioning and nocturnal enuresis. He assessed a GAF of 70,<sup>3</sup> noting  
12 Plaintiff's problem of performing at grade level at school. (Tr.  
13 448.) Dr. Gilbert did not diagnose a marked limitation in short-  
14 term memory.

15 Dr. Toews opined that Dr. Gilbert's report was very thorough,  
16 and consistent with other reports in the record, including the nurse  
17 practitioner's records. (Tr. 491.) Dr. Toews opined:

18 [A]chievement standard scores are at about -1 standard  
19 deviation below average, arithmetic is in the average  
20 range. And, so, she appeared to be functioning at least  
21 cognitively at a fairly good level, low average to average  
range. And I think this reflects that her ability to  
sustain attention and concentration is unimpaired and that

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22 <sup>3</sup> A Global Assessment of Functioning (GAF) of 70 indicates some  
23 mild symptoms (e.g., depressed mood and mild insomnia) or some  
24 difficulty in social, occupational, or school functioning (e.g.,  
25 occasional truancy, or theft within the household), but generally  
26 functioning pretty well, has some meaningful interpersonal  
27 relationships. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4<sup>th</sup> Ed.  
28 (DSM-IV), at 32 (1995).

1 cognitively she's functioning in the high borderline to  
2 low average range of, of intelligence. So, in terms of  
3 acquiring and utilizing information certainly it's much  
4 less than marked and she should continue to do well.

5 The attending and completing tasks, I looked at the . . .  
6 Freedom from Distractability Index score reported by Dr.  
7 Gilbert. Processing speed is particularly important for  
8 children in school reflecting ability to look at and  
9 process routine visual information efficiently. That's  
10 well within the average range and probably accounts for  
11 her ability to succeed academically.

12 Freedom from distractability is relatively low, suggesting  
13 that she may have some difficult[y] processing more  
14 complex kinds of information. And in looking at I.Q.  
15 subtest scores her score under comprehension subtest,  
16 which generally reflects common sense reasoning, is very  
17 low. But her conceptual thinking reflected by the subtest  
18 score on the similarities test is in the low average to  
19 high borderline range. And this reflects some higher  
20 level cognitive ability, thinking ability. She is able to  
21 distinguish essential similarities and differences between  
22 verbally presented things. So, . . . there's . . .  
23 certainly less than marked problem with attention,  
24 attending and completing tasks.

25 The record from the nurse practitioner . . . indicated  
26 that she makes friends easily, that neuro-developmental  
27 progression was within normal limits. And Dr. Gilbert  
28 reported that the Vineland Socialization Domain score was  
about one standard deviation below average, which would  
indicate no significant problem socially. So I don't  
believe there's any limitation in the interacting and  
relating to others. So, the moving about and manipulating  
objects was no limitation. Daily living skills was in the  
low average to average range, so there seems to be no  
difficulty or no limitation in caring for self. Health  
and physical well-being, there was a report that she was  
aneuretic [sic] and the nurse practitioner was prescribing  
[medication] . . . . what is . . . indicated [is] that  
neuro-developmental status was within normal limits, so  
health and physical well-being is less than markedly  
impaired. . . .

23 . . .

24 . . . According to testing that Dr. Gilbert did the  
25 attentional factors would be less than marked.

26 (Tr. 491-492, 494.)

27 Dr. Toews characterized the nurse practitioner's records as  
28 indicating that Plaintiff's neuro-developmental progression was

1 within normal limits. The ALJ relies on the opinions of Drs.  
2 Gilbert and Toews to reject the nurse practitioner's assessed marked  
3 limitation in short-term memory.

4 Ms. Nesmith and Plaintiff's teachers echo treatment provider  
5 Ms. Jones's opinion that Plaintiff has problems with short-term  
6 memory. A more recent examining psychologist, Dennis Pollack,  
7 Ph.D., opined ten days before the hearing that Plaintiff has  
8 markedly severe impairments in two domains (Tr. 472-474) (as  
9 discussed below). Dr. Toews testified he had not received Dr.  
10 Pollack's report. (Tr. 494.)

11 The ALJ's reasons for rejecting the opinion of the treating  
12 nurse practitioner are not supported by substantial evidence.

13 B. Opinion of Examining Psychologist

14 Plaintiff alleges that the ALJ failed to properly credit the  
15 opinion of examining psychologist Dr. Pollack. (Ct. Rec. 14 at 10-  
16 12.) The Commissioner responds that the ALJ properly found that Dr.  
17 Pollack's findings were "in direct contrast to the bulk of the  
18 evidence" contained in the medical record. (Ct. Rec. 16 at 7,  
19 referring to Tr. 26).

20 Dr. Pollack examined Plaintiff on March 22, 2005. (Tr. 467-  
21 474.) He administered four tests, including the MMPI-A and the Test  
22 of Memory Malingered. (Tr. 467.) He reviewed Plaintiff's school  
23 records and Dr. Gilbert's report. Dr. Pollack observed that  
24 Plaintiff quickly became bored with testing and had to have the  
25 items read aloud to obtain her best effort. Dr. Pollack observed  
26 that Plaintiff was rather passive and had to be prompted to answer  
27 questions. (Tr. 467.) Plaintiff was in the seventh grade. (Tr.  
28 468.) Dr. Pollack noted that Plaintiff is educationally delayed and

1 has had an IEP since the fourth grade. She had participated in  
2 physical and speech therapy. Plaintiff takes DVAP and a[nother]  
3 medication for bed-wetting. (Tr. 468.) Plaintiff needs some help  
4 in taking care of her personal hygiene needs, visits regularly with  
5 friends or relatives, and does several household chores. (Tr. 469.)

6 Dr. Pollack observed that because Plaintiff is 13 years old,  
7 her MMPI-A answers must be interpreted cautiously.<sup>4</sup> (Tr. 469.) Her  
8 responses on the test were consistently defensive, while responses  
9 to the Halstead-Reitan Neuropsychological Test Battery revealed  
10 moderate impairment. (Tr. 469-470.) Plaintiff had difficulty with  
11 tasks requiring new concept formation, spatial relations, "motor  
12 coordination, and attention/concentration." (Tr. 470.) Scores on  
13 both Trail Making tests were normal. Results of the Aphasia  
14 Screening Test showed construction dyspraxia, central dysarthria,  
15 spelling dyspraxia, and dyscalculia. (Tr. 470.) Dr. Pollack opined  
16 that Plaintiff's difficulties with new concept formation, language,  
17 mathematics, spatial relations, and eye-hand motor coordination will  
18 continue to impair her ability to learn and "there is a high  
19 probability that she will fall further behind her peers as she gets  
20 older." (Tr. 470.) Dr. Pollack assessed a reading disorder, a  
21 mathematics disorder, and a cognitive disorder not otherwise  
22 specified. (Tr. 470.) He assessed marked impairment in cognitive  
23 and social development, in personal/behavioral development, and  
24 moderate impairment in concentration, persistence, and pace. (Tr.  
25 472-473.) Dr. Pollack opined that Plaintiff's cognitive handicaps

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26  
27 <sup>4</sup> Dr. Pollack noted that the test is designed for adolescents  
28 at least 14 years old. (Tr. 470.)

1 beyond reading, math and writing include new concept formation,  
2 spacial relations, and eye-hand motor coordination, Without close  
3 supervision, her judgment is poor. (Tr. 474.)

4 The ALJ rejected Dr. Pollack's opinion:

5 [Dr. Toews testified] that the record shows that the  
6 claimant's achievement scores are one deviation below  
7 standard. She has a high borderline to low average  
8 cognitive ability and attention and concentration is  
9 unimpaired. Dr. Toews testified that she may have  
10 difficulty processing more complex tasks. The record  
11 shows no social problems and no limitations in daily  
12 living skills. Dr. Toews went on to testify that two  
13 grades below in achievement ability are not considered a  
14 marked impairment and the report by Dr. Pollack that she  
15 is reading at the 4<sup>th</sup> grade level is unsupported by any  
16 test scores, and Dr. Toews testified he saw no  
17 justification for a learning disability. Dr. Toews  
18 testified that in the domain of acquiring and using  
19 information, the claimant has less than marked  
20 limitations. In attending and completing tasks, she has  
21 less than marked limitations. She has no limitations in  
22 interacting and relating with others, in moving about and  
23 manipulating objects, or in caring for self. In health  
24 and physical well being, she has less than marked  
25 limitation. (See, in accord, Exhibit 10E).

26 (Tr. 23.)

27 The exhibit referenced by the ALJ (Exhibit 10E), is the form  
28 completed by Dr. Toews on April 23, 2005. (Tr. 439-440.) In the  
same form, Dr. Toews observed: "Neuro development within normal  
limits per ARNP notes." (Tr. 440.) Dr. Toews indicated Plaintiff  
was either less than markedly impaired or had no limitation in each  
domain. (Tr. 439-440.)

29 The ALJ rejected Dr. Pollack's opinion, finding that it

30 [I]s in direct contrast to the bulk of the evidence  
31 contained here, as outlined above. Dr. Toews testified he  
32 saw no justification for a learning disability although  
33 the claimant is in special education for reading and math.  
34 Dr. Gilbert reported that none of the academic testing  
35 scores were low relative to her verbal IQ score of 78.

36 (Tr. 26.) The "bulk of the evidence" referenced by the ALJ in his

1 decision includes: (1) Plaintiff's testimony that she can type and  
2 gets along well with others; (2) Dr. Gilbert's opinion; (3) school  
3 records from the 7th grade showing Plaintiff was eligible for  
4 special education pull-out services in reading and math, which were  
5 at the 5<sup>th</sup> and 4<sup>th</sup> grade levels, respectively; (4) school records from  
6 the same period showing Plaintiff was on task, doing well, acted as  
7 a teacher's helper, worked hard, and set a good example; (5) a  
8 teacher's report in February of 2003 that Plaintiff does not grasp  
9 new concepts easily and has borderline intellectual functioning; (6)  
10 a teacher's note that Plaintiff had difficulty turning work in on  
11 time and staying on task; (7) a teacher's observation that Plaintiff  
12 has a close group of friends; (8) Plaintiff participates in PE, and  
13 Ms. Nesmith reports Plaintiff has a happy disposition; and (9) Ms.  
14 Nesmith testified that Plaintiff is 2 to 3 years behind her age  
15 group, but this was given little weight by the ALJ because it was  
16 found to be in conflict with school evidence and medical expert  
17 evaluation. (Tr. 21-26.)

18 The ALJ's reasons for rejecting Dr. Pollack's opinion are not  
19 supported by substantial evidence. Contrary to the ALJ's statement,  
20 Ms. Nesmith's testimony that Plaintiff is 2 to 3 years behind her  
21 age group (at least academically), is supported by school records.  
22 In February of 2002, Plaintiff's teacher, Debbi Hatcher, reported  
23 Plaintiff was performing at least two or more years below grade  
24 level and had difficulty keeping pace with other children. (Tr.  
25 376.) The academic content of her lessons had to be modified to two  
26 grade levels below the current grade in four subject areas. Ms.  
27 Hatcher, like Nurse Jones, expressed concern with respect to  
28 Plaintiff's short-term memory. Ms. Hatcher noted that Plaintiff

1 took the attendance chart to the office, but often forgot to bring  
2 back items from the mailbox as Ms. Hatcher had asked. (Tr. 376.)  
3 The ALJ's third reason (working two and three grades below level  
4 even with pull-out special educational assistance) supports rather  
5 than undermines Dr. Pollack's assessment. Similarly, the ALJ's  
6 fifth and sixth reasons (teacher's opinion that Plaintiff does not  
7 grasp new concepts easily and has borderline intellectual  
8 functioning, and has a difficult time staying on task and turning  
9 even modified work in on time) support, rather than diminish, the  
10 weight to be given to Dr. Pollack's opinion. The remaining evidence  
11 cited by the ALJ seems to support finding no or limited impairment  
12 with respect to physical well-being, but does not support the ALJ's  
13 rejection of Dr. Pollack's opinion, particularly his opinions which  
14 are consistent with those of Plaintiff's teachers, parent, and  
15 treating nurse practitioner.

16 In 2003, Plaintiff's teachers indicated that she did not grasp  
17 new concepts easily. (Tr. 402.) Teacher adjusted her class work to  
18 allow her to participate in class, with shortened lessons, direct  
19 instruction, and more time to finish activities. She was in 300  
20 minutes a week of special education instruction. (Tr. 402.) Even  
21 so, Plaintiff made limited progress when doing work two grades below  
22 grade level, had difficulty staying on task, turning work in on  
23 time, and finishing her written schoolwork. (Tr. 403.) The opinions  
24 of the nurse practitioner, teachers, and Ms. Nesmith are largely  
25 consistent with Dr. Pollack's opinion.

26 Testimony of a medical expert may serve as substantial evidence  
27 when supported by other evidence in the record. *Andrews*, 53 F.3d at  
28 1041. In this case, the ALJ relied on the medical expert's



1 testimony and did not properly reject the opinion of the most recent  
2 examining psychologist, Dr. Pollack. Although not raised by the  
3 Plaintiff, it also appears that the ALJ's reasons for discrediting  
4 the testimony of Ms. Nesmith are not supported by the evidence.

5 C. Remedy

6 There are two remedies where the ALJ fails to provide adequate  
7 reasons for rejecting the opinions of a treating or examining  
8 doctor. The general rule, found in the *Lester* line of cases is that  
9 "we credit that opinion as a matter of law." *Lester*, 81 F.3d at  
10 834; *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990); *Hammock*  
11 *v. Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989). Under the alternate  
12 approach found in *McAllister*, *supra*, a court may remand to allow the  
13 ALJ to provide the requisite specific and legitimate reasons for  
14 disregarding the opinion. See also *Benecke*, 379 F.3d at 594 (court  
15 has flexibility in crediting testimony if substantial questions  
16 remain as to claimant's credibility and other issues). Where  
17 evidence has been identified that may be a basis for a finding, but  
18 the findings are not articulated, remand is the proper disposition.  
19 *Salvador v. Sullivan*, 917 F.2d 13, 15 (9<sup>th</sup> Cir. 1990) (citing  
20 *McAllister*); *Gonzales v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir.  
21 1990).

22 It is unclear from the record whether Plaintiff would be found  
23 disabled if the medical evidence and the testimony of Plaintiff's  
24 mother were properly analyzed. The court expresses no opinion as to  
25 what the ultimate outcome on remand will or should be. The fact-  
26 finder is free to give whatever weight to the evidence is deemed  
27 appropriate. See *Sample v. Schweiker*, 694 F.2d 639, 642 (9<sup>th</sup> Cir.  
28 1982) ("questions of credibility and resolution of conflicts in the

1 testimony are functions solely of the Secretary"). Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
4 **GRANTED**; the matter is **REMANDED** to the Commissioner for additional  
5 proceedings.

6 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is  
7 **DENIED**.

8 3. Judgment shall be entered for **PLAINTIFF**. An application  
9 for attorney fees may be filed by separate motion.

10 4. The District Court Executive is directed to enter this  
11 Order, provide a copy to counsel for Plaintiff and Defendant, and  
12 **CLOSE** the file.

13 DATED April 8, 2008.

14  
15 S/ CYNTHIA IMBROGNO  
16 UNITED STATES MAGISTRATE JUDGE  
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